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In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. . . . . .

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

ABRAHAM GOLDBERG,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

To the Honorable the Justices of the Supreme Court of the United States:

The undersigned, on behalf of The Columbian National Life Insurance Company, petitioner, prays that a writ of certiorari may issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered January 13, 1947, in the case between the above-named parties, docketed therein as No. 10,317, affirming the judgment of the District Court for the Northern District of Ohio, Eastern Division, wherein the petitioner was defendant and the respondent plaintiff.

OPINIONS BELOW.

The memorandum opinions of the District Court (R. 73-75; R. 95-96), were not published. The opinion of the Circuit Court of Appeals (R. 159) is published at 158 F. (2d) 971.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 13, 1947. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, U. S. C. Title 28, 347. The jurisdiction of the District Court was based upon Sections 274(d) and 24 of the Judicial Code, as amended, U. S. C. Title 28, 400 and 41(1).

QUESTIONS PRESENTED.

1. Can a federal court hold that a payment was involuntary, and hence recoverable, because made after bringing a petition for a declaratory judgment of nonliability, and in fear of losing contractual rights, where the settled applicable state decisions are that voluntary payments cannot be recovered, and that neither protest, nor the pendency of legal proceedings to enforce payment, nor the fear of losing contractual rights render payments involuntary?

2. Where the circuit court of appeals sitting for a particular state has considered the decisions and declared the law of that state, should another circuit court of appeals be permitted to announce that decision to be an unwarranted extension of the state cases?

3. Where the applicable state law is that even if an insured is held to be entitled to the disability benefits under his policy, he cannot recover premium payments which should have been waived, can a federal court hold that it would be a "nullification" of its decision that the insured was entitled to disability benefits to refuse to permit him to recover such premium payments?

STATEMENT OF THE CASE.

The plaintiff below brought a petition for a declaratory judgment against his insurer, the defendant below, asserting that he had become totally and permanently disabled before age 60 and was entitled to waiver of premium benefits under his policy. He asked for a declaration of rights, but stated in briefs filed with the court that he was not requesting at that time a return of premiums. During the pendency of the action he made premium payments under protest. It was eventually held that he was entitled to the benefit of the disability provisions and the defendant below thereafter waived premiums as they fell due. It refused, however, to return the premiums already paid, and the present action was brought to compel their repayment by crediting the amount thereof on the policy loan (R. 2-4). The defendant answered that in the prior action no money judgment had been prayed for or granted, that the premiums now sought back had been paid in the Commonwealth of Pennsylvania, that the policy was a Pennsylvania contract, and that premium payments, even if made under protest, were considered voluntary under the law of Pennsylvania, and could not be recovered (R. 12-15).

Stipulations having been filed showing the proceedings and briefs in the former action, both parties moved for summary judgment. In affirming the action of the District Court granting the plaintiff's motion the Circuit Court of Appeals indicated that the Pennsylvania state court decisions did not involve payments made during the pendency of a lawsuit (without mention of the Pennsylvania case that did), and stated that a decision of the Circuit Court of Appeals for the Third Circuit holding that the pendency of a lawsuit did not affect the situation was an unwarranted extension of the Pennsylvania law (R. 160). It gave as the reasons for its decision the very reasons which the Pennsylvania state cases had uniformly rejected.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In affirming the action of the District Court granting the plaintiff's motion for summary judgment.

2. In refusing to follow the plain, unambiguous decisions of the state court of Pennsylvania.

3. In refusing to follow the plain, unambiguous decision of the Circuit Court of Appeals for the Third Circuit applying the Pennsylvania law.

4. In holding that the "effect" of its prior opinion, in which it had expressly stated that plaintiff "is entitled to no money judgment. Indeed, no such judgment has been prayed" was to entitle the plaintiff to a money judgment.

REASONS FOR GRANTING THE WRIT.

1. The Pennsylvania law, which the Circuit Court of Appeals was required to apply (*Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202), as to what constitutes a voluntary, and hence irrecoverable, payment is clear and explicit and the court's decision constituted a flat refusal to apply it.

Sebastianelli v. Prudential Ins. Co., 337 Pa. 466, 12 Atl. (2d) 113;
De la Cuesta v. Ins. Co., 136 Pa. 62;
Ditman v. Raule, 134 Pa. 480.

2. The decision of the Circuit Court of Appeals is in direct conflict with the decision of the Circuit Court of Appeals for Pennsylvania interpreting and applying the Pennsylvania law.

New York Life Ins. Co. v. Levine, 148 F. (2d) 313.

3. The question involved in the case at bar was not present in the earlier case, as plaintiff below expressly stated in that case, and as the court then expressly held. The court's present interpretation of that case was both a

refusal to follow a state decision distinguishing the right to disability benefits and the right to a return of premium payments which should have been waived,

Sebastianelli v. Prudential Ins. Co., 337 Pa. 466, 12 Atl. (2d) 113,

and an unwarranted departure from the accepted and usual course of judicial proceedings.

WHEREFORE the petitioner prays that a writ of certiorari issued under the seal of this Court directed to the Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals in this case, which was entitled in that court *The Columbian National Life Insurance Company, Defendant-Appellant vs. Abraham Goldberg, Plaintiff-Appellee,* No. 10317, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed, and for such further relief as to this Court may seem proper.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY,

By C. J. HOYT,

Counsel for Petitioner.

Dated April 2, 1947.

In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY,
Petitioner,

vs.

ABRAHAM GOLDBERG,
Respondent.

BRIEF IN SUPPORT OF THE PETITION.

STATEMENT.

Statements regarding the opinion of the court below, the jurisdiction of this Court, the questions presented, and the errors assigned will be found in the petition.

ARGUMENT.

A. Law of Pennsylvania Governs.

The law of Pennsylvania where the policy was written (R. 103), and where the premium payments were made (R. 25), governs, and not the law of Ohio.

Ruhlin v. New York Life Ins. Co., 304 U. S. 202;
Mutual Life Ins. Co. v. Cohen, 179 U. S. 262;
Equitable Life Ins. Co. v. Gerwick, 50 Oh. App. 277, 197 N. E. 923.

This suit is to recover the premium payments even though the plaintiff merely seeks a credit against his loan rather than the actual cash.

B. Under Pennsylvania law, the premium payments were voluntary.

Pennsylvania law is perfectly clear to the following effect:

1. Voluntary payments cannot be recovered.

Ditman v. Raule, 134 Pa. 480;
De la Cuesta v. Insurance Co., 136 Pa. 62;
Tugboat Indian Co. v. Rederi, 334 Pa. 15, 5 Atl. (2d) 153.

2. A payment is none the less voluntary because made under protest;

Harvey v. Girard Nat. Bank, 119 Pa. 212;
De la Cuesta v. Insurance Co., 136 Pa. 62;

or during the pendency of an action to enforce payment.

Ditman v. Raule, 134 Pa. 480.

3. Payment by a disabled insured of a premium which he claims should have been waived, made in order to keep his policy from lapsing in case he is found to be wrong in believing himself disabled, is under Pennsylvania law a voluntary and hence irrecoverable payment. The threat of losing the policy is not duress.

Sebastianelli v. Prudential Ins. Co., 337 Pa. 466, 12 Atl. (2d) 113;
Astrin v. Metropolitan Life Ins. Co., 341 Pa. 120, 17 Atl. (2d) 887;
Feigenbaum v. Prudential Ins. Co., 144 Pa. Superior Court 412, 19 Atl. (2d) 542.

The Circuit Court of Appeals held that these cases were distinguishable because the insured here, before making the payments in question, had brought an action for a declaratory judgment of non-liability. This, it stated, deprived the payments of their voluntary character.

The Circuit Court of Appeals for the Third Circuit has expressly held that the pendency of a declaratory petition does not change the Pennsylvania law regarding the recovery of premium payments.

New York Life Ins. Co. v. Levine, 148 F. (2d) 313.

The court below stated as to this:

> "We think there was no compulsion by the Pennsylvania authorities that the doctrine of voluntary payment should be carried to the extent to which the Court of Appeals carried it.
>
> "• • • The insurance company knew that in the circumstances the premiums were not being voluntarily paid in any true sense of the word 'voluntary.' The fear of Goldberg that he might be cast in his pending suit was manifestly a very real fear. Obviously, he felt that he might be risking his all under the policy, if he should fail to win. Payment by the victim of such fears is not a free will offering." (R. 161) (158 F. (2d) at 973.)

This was not a "distinguishing" of the Pennsylvania rule, but a flat refusal to follow it.

In *De la Cuesta v. Ins. Co.,* 136 Pa. 62, in holding voluntary a payment made under protest, the court stated:

> "There was nothing but the denial of a right, and a declared intention not to recognize a right is not duress." (p. 82.)
>
> "We may concede that the action of the company placed him in a 'dilemma'; he had to choose between two roads, neither of which he may have regarded as safe. In other words, he was uncertain as to his legal rights. • • • The 'dilemma' was the uncertainty of the law. There was no other pressure or duress that caused the payment. However great the uncertainty of the lav may be in particular cases, it has never been supposed to amount to duress of either person or goods." (p. 83.)

In *Sebastianelli v. Prudential Ins. Co.*, 337 Pa. 466, 12 Atl. (2d) 113, the court said at p. 470 (12 Atl. (2d) at 115), that the premiums

> "were paid by him without any compulsion which the law recognizes as constituting coercion or duress; the fact that he may have been in a practical dilemma, not wishing to risk the forfeiture of his policy in case he should fail to prove the total disability which he claimed, made the payments no less voluntary within the meaning of the law. Therefore he cannot now recover them."

The above-quoted reason of the Circuit Court of Appeals for not "extending" the Pennsylvania rule was merely an argument for rejecting the rule and the reasoning of the Pennsylvania courts in their entirety.

The court stated that because of the pendency of the declaratory suit the defendant "knew that the payments were not voluntary." The defendant's "knowledge" did not make them involuntary. The defendant had the same knowledge as it had in any case where there was a protest—that the plaintiff did not wish to pay and intended to sue to recover. It was expressly held in *De la Cuesta v. Insurance Co.*, 136 Pa. 62, that such knowledge did not make the payment involuntary.

Neither did the pendency of legal proceedings.

Ditman v. Raule, 134 Pa. 480;
De la Cuesta v. Ins. Co., 136 Pa. 62, 79 *et seq.*

There was no whit more duress after the plaintiff's suit was brought than before. The decision of the Circuit Court of Appeals in *New York Life Ins. Co. v. Levine*, 148 F. (2d) 313, not only should have been respected as the Pennsylvania circuit,*

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* To paraphrase *Fidelity Union Trust Co. v. Field*, 311 U. S. 169, 180, it is inadmissible that there should be one rule of state law for litigants in the federal courts for that state and another rule for litigants who bring the same question before another federal court.

Associate Ind. Corp. v. Garrow Co., 39 F. Supp. 100 (S. D. N. Y.);

Mormand v. Universal Film Exchange, 43 F. Supp. 996 (D. Mass.);

New York Life Ins. Co. v. Ruhlin, 25 F. Supp. 65 (W. D. Pa.).

but was the only proper interpretation of the Pennsylvania law as to voluntary payments.

C. The prior decision did not affect the present case.

Realizing that it could not call its prior decision *res judicata*, the court below nevertheless sought to lean on that case as "in effect" supporting its present decision. For this it quoted neither reason nor authority.

The prior action was a petition for declaratory judgment as to the question of the true age of the insured, the date of onset of his disability, and its character, as to totality and permanency. Plaintiff had prayed for a declaration that he was "entitled to the waiver of premium provision," and for general relief (R. 6-7). The court ultimately determined that he was "since July 1, 1939 entitled to all of the benefits of the provisions of said policy" (R. 121). There was no money judgment, no order for the repayment of the premiums paid during the pendency of the suit, and no order for the crediting of them on the loan (R. 11, 121). There was not even any claim that any premiums should be repaid. On the contrary, the Circuit Court of Appeals went out of its way to state:

> "Appellee (Plaintiff) is entitled to the waiver of all premiums becoming due after July 1, 1939, so long as he remains wholly disabled by bodily injury or disease. • • • Upon the present state of the pleadings, he is entitled to no money judgment. Indeed, no such judgment has been prayed." (138 F. (2d) at 196.)

The only mention of a possible return of premiums was in a brief filed at the outset of the case by the defendant

below on the subject of the jurisdictional amount, stating that there was included in the controversy "premiums paid by plaintiff since his claimed disability arose July 1, 1938 to the filing of this action December 11, 1939" (R. 125). This statement was due to a misconception of the breadth of relief permitted under the general prayer. The plaintiff promptly replied, in three separate briefs:

> "The insured is not * * * suing the insurance company for the return of the premiums paid since the disability allegedly occurred." (R. 132-3.)
>
> "Plaintiff does not seek to recover all of the premiums that he has paid upon the policy since filing proofs of loss." (R. 138-9.)
>
> "We ask for no return of any premium in this action." (R. 139.)

As a consequence of this plain statement of the issue by the proponent of the action, the defendant naturally did not and could not raise the one single question that is involved in the present suit—namely, whether, even if the insured was entitled to a waiver of premiums, he could *recover* the premiums already paid. The statement above quoted of the Circuit Court of Appeals to the effect that that was not in issue was accordingly entirely accurate.

Now the Circuit Court of Appeals says:

> "It would be an inequitable nullification of the declaratory judgment previously rendered to hold voluntary the premium payments made by Goldberg during the pendency of his suit." (158 F. (2d) at 973.)

Thus the defendant was prevented from raising an issue in the first suit, and then told in the second suit that it would be inequitable to raise it. In all earnestness, the defendant asks, when was it supposed to assert the clear Pennsylvania proposition that voluntary payments could not be recovered?

The court's present holding that it would be a "nullification" of its prior decision not to permit the insured to

recover his premium payments is directly contrary to *Sebastianelli v. Prudential Ins. Co.*, 337 Pa. 466, 12 Atl. (2d) 113. There the court held that even though the insured must be paid the income benefits for previous years of disability, he could not recover the premium payments that he need not have made. The decision of the court below that the previous holding that the insured was "entitled to all of the benefits of the provisions of policy" (R. 121, 11), was "in effect" (R. 161; 158 F. (2d) at 973) a decision that he could recover premium payments, and was exactly contrary to the *Sebastianelli* case, as well as contrary to orderly and accepted judicial procedure.

CONCLUSION.

The defendant respectfully submits that the Circuit Court of Appeals disregarded the clear holdings of the Pennsylvania court, the reasoning and principles which that court had announced, the decision of the Circuit Court of Appeals sitting for Pennsylvania, and the court's own statement of what was involved in its prior decision, and that for these reasons a writ of certiorari should issue.

Respectfully submitted,

C. J. Hoyt.

Bailey Aldrich,

Of Counsel.